No. 80-1360

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GENERAL ATOMIC COMPANY,
Appellant,

v.

UNITED NUCLEAR CORPORATION
and
INDIANA & MICHIGAN ELECTRIC COMPANY,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW MEXICO

MOTION OF APPELLEE INDIANA & MICHIGAN ELECTRIC COMPANY TO DISMISS OR AFFIRM

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March 17, 1981

QUESTIONS PRESENTED

1. Whether the May 7, 1979 judgment of the New Mexico Supreme Court, as to which certiorari has been denied by this Court, was not a final judgment for purposes of 28 U.S.C. § 1257, so that as to that judgment this appeal is untimely?

2. Whether Appellant has drawn the validity of state statutes into question in the manner required by 28 U.S.C. § 1257(2)?

3. Whether the New Mexico Supreme Court was not correct in affirming a default judgment on issues of liability entered by a state trial court in a commercial case when the defaulted party engaged in a two-year course of obstructing discovery for the purpose and with the effect of depriving the court and the other parties of evidence critical to the claims and defenses in issue?

4. Whether Appellant's invocation of doctrines of act of state, sovereign compulsion and similar concepts, about which Appellant precluded inquiry by refusing discovery, destroyed the state court's jurisdiction of a commercial case?

5. Assuming *arguendo* that this appeal is not untimely as to the May 7, 1979 judgment of the New Mexico Supreme Court, whether a federal question is raised by Appellant's claim that its invocation of arbitration precluded all further judicial proceedings, including an ongoing trial involving a second defendant (Indiana & Michigan Electric Company) which was under no obligation to arbitrate, where Appellant had expressly disclaimed any desire to stay or arbitrate issues involving the second defendant?

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No. 80-1360

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Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW MEXICO

MOTION OF APPELLEE INDIANA & MICHIGAN ELECTRIC COMPANY TO DISMISS OR AFFIRM

Appellee Indiana & Michigan Electric Company[1] moves to dismiss the appeal or, in the alternative, affirm the judgment below on the grounds set forth herein. Treating

[1] The information required by this Court's Rule 28.1 appears in Appendix A to this Motion. We will hereafter refer to the parties as follows: General Atomic Company as "GAC"; United Nuclear Corporation as "UNC"; and Indiana & Michigan Electric Company as "I&M". GAC's Jurisdictional Statement will be cited as "J.S."; references to GAC's Appendix will be to "A. ——a"; references to the record below will have the prefix "R."—— (for references to the pleading record) or "Tr."—— [date] (for references to the trial transcript); or "[Witness] Dep." ——— [date] (for references to depositions). The *Amicus* Brief on behalf of Canada will be cited as "Canadian Brief".

the papers as a petition for writ of certiorari the writ should be denied.[2]

Statutes Involved

Rules 33, 37(a) and 43(c) of the New Mexico Rules of Civil Procedure, which are not included in the Constitutional and Statutory Appendix to the Jurisdictional Statement, are involved in this case. These Rules are set forth in Appendix B to this Motion.

Counterstatement of the Case

The New Mexico courts neither adjudicated the validity of acts of the Canadian government nor imposed sanctions upon any conduct in a foreign country compelled by the government of that country. Rather, they exercised jurisdiction to hear and decide a contractual claim, and to determine whether GAC would be permitted to escape its contractual obligation to supply I&M with uranium at a stated price on the basis of a sharp rise in the price of uranium.[3] The New Mexico courts were concerned only with whether an American company could engage in concerted activity in the United States or with intended effect in the United States and then escape both liability under

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[2] The August 29, 1980 judgment of the New Mexico Supreme Court affirmed in full the trial court's sanctions order and default judgment; however, it remanded so much of the second amended final judgment of May 17, 1978 (reproduced at GAC's Appendix E), as awarded I&M close to $16 million in damages, for the purpose of holding a hearing on whether I&M's right to monetary damages was restricted by the contract's limitation of liability and equitable adjustment clauses. GAC obviously takes the position *sub silentio*, with which we agree, that the remanded points on which the New Mexico Supreme Court reversed do not affect the finality of the judgment of that court for purposes of 28 U.S.C. § 1257.

[3] As the New Mexico Supreme Court's Opinion notes, GAC and Gulf agreed at a strategy meeting on January 13, 1976, on a "plan to welch on *all* utility contracts." A. 44a n.32.

the antitrust law of New Mexico and its contractual obligations by asserting as a defense the price rise which it, through its concerted activity, had caused. GAC prevented the courts from completing their inquiry and deciding the genuine issues by frustrating proper discovery.

GAC's account of the Canadian government's participation in the uranium cartel is irrelevant in light of its concession, J.S. 10 n.5; *see also* Canadian Brief 7, that no foreign government compelled private anticompetitive activity in the United States and that all facts relating to the cartel may be proved as "background and motivation" for its conduct. GAC's protestations that it could not legally make discovery from Canada because of Canada's Uranium Information Security Regulations ("Security Regulations"), adopted September 23, 1976, are equally irrelevant, since default was imposed because (a) GAC evaded demands for discovery of cartel data for at least five months *before* those Regulations were adopted, as well as thereafter, (b) Gulf Oil Corporation ("Gulf"), GAC's constituent partner, deliberately housed cartel documents in Canada to impede their discovery, and (c) GAC, ignoring court orders and its own stipulations, persistently refused to provide promised responsive answers to interrogatories, provided incomplete answers and withheld required documents, including documents in the United States.

The *Amicus* Brief submitted on behalf of the Government of Canada states its concern lest GAC suffer sanctions because of Gulf's obedience to the Security Regulations. Canadian Brief 2-3; 6-7. Canada has overlooked the fact that GAC was not defaulted for its compliance with Canadian law, but for its persistent violation of its discovery obligations under American law. Canada cannot, and does not, legitimize Gulf's policy of deliberately housing documents in Canada to avoid discovery; or cloak GAC's deliberate nondisclosure of cartel documents and information for months before the Security Regulations were adopted; or immunize GAC's deliberate and continuing policy of giving

incomplete, misleading and evasive responses to interrogatories; or protect an American company from civil liability under U.S. laws for acts committed in the United States, and Canada does not intend to do so. Canadian Brief 7.

Because of GAC's failure to make discovery and resulting default, this straightforward commercial case was decided without reaching controversies regarding its alleged international aspects. This appeal is at bottom limited to issues of discovery, involving questions of fact adequately dealt with below and inappropriate for review here. GAC's abstract assertions of act of state and interference with foreign relations are interposed to cloud its egregious discovery defaults undertaken to cover up its private conspiratorial activity, and in an attempt to put off the day of final disposition. They are not truly implicated in this case.

(A) Facts Leading to the Suit

In 1968, I&M executed a long-term supply contract with UNC (the "I&M Contract") to provide I&M with fabricated nuclear fuel assemblies and uranium for its nuclear plant. Between 1971 and 1974, the I&M Contract passed to Gulf, and was in turn assumed by GAC, a partnership of Gulf and Scallop Nuclear, Inc. ("Scallop"). UNC and Gulf remained liable on the contract.

In December 1975, UNC brought this suit ("the Santa Fe action") against GAC, seeking a declaration that its uranium contracts with GAC were unenforceable and invalid under the antitrust laws, and by reason of GAC's fraud and breach of fiduciary duty.

In February 1976, I&M sued GAC and Gulf on the I&M Contract in the United States District Court for the Southern District of New York. When I&M moved in October 1976 to add a Sherman Act claim based on the uranium cartel, Gulf and GAC obtained dismissal of the action for want of an indispensable party, UNC, claiming that they required a "unitary forum" such as the Santa Fe court

to avoid inconsistent results. GAC then impleaded I&M in the Santa Fe action, alleging that the I&M Contract was unenforceable by reason of "commercial impracticability" arising from the increase in uranium prices and UNC's refusal to deliver, and sought a limitation of liability and a price adjustment for delay, which also implicated the uranium price increases. I&M answered that GAC by its antitrust violations had caused foreseeable price increases and precipitated UNC's refusal to deliver, and sought specific performance. Trial was set for October 31, 1977.

(B) Discovery Relating to GAC's Anticompetitive Activity

When this case began, neither Appellee had any detailed knowledge of the uranium cartel or Gulf's role in it. The cartel strenuously protected its secrecy. I&M did not move until October 1976 to add an antitrust claim. UNC originally asserted that Gulf had sought a monopoly of uranium production in New Mexico (which has over half of total U.S. production). Cartel evidence remains sketchy because of GAC's "stonewalling" tactics, A. 17a, but at least this much is known:

Gulf was a member of the cartel by June 1972. A. 13a. Gulf officials from Denver and San Diego attended cartel meetings, A. 35a, including the founding conferences in Johannesburg in mid-1972 where the cartel rules were written.[4] One official reported that "overall strategy must reflect the interrelationship existing between foreign and domestic markets. . . [F]oreign and domestic marketing activities are inseparable and indeed should be treated integrally if we are to optimize the company position." *Id.*

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[4] The organizational rules of the cartel specifically excluded the United States, A. 35a, and Canada has stated that the United States was excluded from the operation of the intergovernmental marketing arrangements. A. 52a. However, Prime Minister Trudeau acknowledged, "We have no knowledge what some companies may have done under the pretext or cover of government policy." A. 52a.

Gulf's representative on the cartel's Operating Committee admitted that cartel members discussed targeting their anticompetitive activity at American companies; although Westinghouse was the principal subject, it "was not necessarily singled out for discussion each and every time. There were others who were discussed from time to time, also; GE . . ., Exxon as a fuel fabricator, Gulf-United as a fuel fabricator . . ." A. 37a. Another Gulf official admitted that the cartel's activities were artificially inflating the price of uranium in the U. S. domestic market. A. 39a. Referring to Westinghouse, the cartel minutes state, "The consensus finally reached was that if the club was to survive as a viable entity, it would be necessary to delineate where the competition was and the nature of its strength, as a prelude to eliminating it once and for all." A. 36a.[5]

As the New Mexico Supreme Court observed, in reviewing the available information on Gulf's cartel involvement, A. 32-41a, " . . . we are satisfied that cartel information is relevant to the subject matter of this litigation in general, and to the specific allegations of the parties .... These things are not the stuff of which antitrust irrelevancy is made." A. 39-40a.

Despite such telling fragments, and as a result of GAC's shocking policy of concealment of properly producible material, so much relevant material regarding GAC's private anticompetitive acts was withheld that Appellees were designedly deprived of their right to fairly present their case on the merits.

GAC has asserted an act of state defense, but has withheld the evidence about the interaction between Gulf and the Canadian government needed to evaluate it. There is evidence that (i) Gulf initially resisted joining the cartel

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[5] The United States Department of Justice filed a criminal information against Gulf on May 9, 1978 (*U.S.* v. *Gulf Oil Corp.*, Crim. No. 78-123 W.D. Pa.), alleging anticompetitive activity directed at the United States market. Gulf pleaded *nolo contendere*.

and wanted to be ordered to join it, but the Canadian government refused, A. 53-59a; (ii) Gulf considered seeking the advice of the Justice Department, but decided to take a "business risk" and not do so, A. 57a; and (iii) Gulf volunteered to ferret out Westinghouse's sources of uranium, competition the cartel wanted to eliminate. Hunter Dep. 120-21, Sept. 27, 1977. There is no evidence Canada supported such efforts or the cartel's decision to discuss bids to the U.S. customers, and indeed, Canada's brief suggests the contrary. Nevertheless, these subjects were discussed at length at cartel meetings. Gregg Dep. 258-60, Aug. 31, 1977. Without the cartel data GAC withheld, it is impossible to ascertain the full scope of Gulf's private anticompetitive activities.

(C) GAC's Flagrant Abuse of Discovery

GAC's course of misconduct in discovery is carefully examined in the Opinion of the New Mexico Supreme Court. A. 91-179a. We summarize to illustrate that GAC brought default on itself not by innocent inability to produce Canadian documents, but by deliberate perversion of the entire discovery process.

UNC expressly requested information and documents concerning the uranium marketing agreements of GAC, Gulf and Scallop in the interrogatories served on December 31, 1975, nine months before the Security Regulations were promulgated.[6] A. 118a. On March 12, 1976, GAC stipulated

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[6] UNC, for example, posed the following interrogatories and asked for the documents of Gulf and Scallop related to the answers:

32. Identify all agreements and all past, pending or contemplated negotiations of the partnership or the partners directly or indirectly pertaining to the processing of uranium bearing ores into U_3O_8 the conversion thereof into UF_6 or any other form and the marketing and sale of all such uranium bearing products.

33. Identify all agreements and all past, pending and contemplated negotiations of the partnership or the partners directly or indirectly pertaining to the acquisition of uranium in any form.

(footnote continued on following page)

that it would answer the interrogatories in good faith and produce the documents called for. A. 97, 102-03a. Nevertheless, neither GAC's first answers, filed April 5, 1976 (five months before the Security Regulations), nor its production of documents, which commenced in June 1976, provided information regarding GAC's or Gulf's participation in the cartel. A. 15, 103-04a. Throughout 1976 and into 1977, GAC withheld, without stating an objection, documents of its constituent partners, including Gulf's cartel records, which were plainly requested. A. 103, 110a.

In August 1976, UNC moved for default judgment, alleging that GAC's answers to interrogatories were "so evasive and unresponsive" as to constitute a failure to answer. A. 104a. Incredibly, GAC responded, "The issue . . . is whether or not defendant wilfully failed to answer the interrogatories. The issue is not whether defendant's answers are factually correct." A. 105a.[7] Testimony was taken at several hearings concerning GAC's good faith in responding to the interrogatories and producing documents, and the court admonished GAC and its constituent partners to make good faith discovery. A. 104-05a; R. 1082. In early 1977, UNC moved for production of cartel-related documents which had been produced in other cases. A. 107-08a. The trial court held such documents were relevant and encompassed by the December 31, 1975 interrogatories. A. 108-09a. Nevertheless, in April 1977, GAC filed further answers to the interrogatories making no mention of the cartel. A. 109a. By various undisclosed excuses, GAC succeeded in delaying cartel discovery until the Security Regulations were in place.

(footnote continued from preceding page)

34. Identify all studies, evaluations, projections and other data pertaining to uranium ore reserves, the mining and milling thereof, the further processing and conversion of uranium and the marketing and sale of all such uranium products. A. 98a n.80.

[7] The Supreme Court of New Mexico observed, "This is not a correct statement of the law." A. 106a. It clearly is not.

GAC claimed in the court below that

> (a) GAC did not believe cartel information was called for until after the Security Regulations were enacted. The New Mexico Supreme Court observed, "There was no reason for GAC's belief that the cartel was not covered by the interrogatories except its desire to so believe." A. 118a.
>
> (b) GAC determined UNC had no right to information in the hands of GAC's partners and would not produce it, even though the trial court repeatedly ruled that GAC must produce such evidence. A. 106-07a. The New Mexico Supreme Court observed, "GAC's eventual production of thousands of partner documents demonstrates that such materials were available from the outset. This conduct . . . is compelling evidence of bad faith and merits the strongest condemnation." A. 114a (footnote omitted).
>
> (c) GAC thought production of cartel documents was precluded by the Ontario Business Records Protection Act. GAC did not abandon this argument until oral argument in the New Mexico Supreme Court in May 1979. A. 124a. The New Mexico Supreme Court held. "'[S]uch complete reversal of position . . . show[s] "callous disregard of the responsibilities" owed' by GAC and its counsel to the court and to the adversary parties." A. 125a.

In August 1977, UNC served its second interrogatories, inquiring in further detail into the anticompetitive activities of Gulf and GAC and GAC's defenses of act of state and sovereign compulsion. A. 129a. GAC objected to these interrogatories as duplicative of the first interrogatories, A. 129-30a, but it did not mention the Security Regulations (although it had referred to them in March 1977). A. 129-31a. GAC then promised to answer using the knowledge of its senior management, including that of Gulf's Canadian

subsidiary, and to provide responsive documents, A. 130, 140a, but failed to keep this promise. A. 131a. Only at the end of September 1977, with the trial one month away, did GAC, in a footnote, identify the Security Regulations as the basis of its objection.[8] A. 131, 143a. The trial court found GAC's responses grossly inadequate, *inter alia,* for failure to comply with its order (and GAC's agreement) to commit to statements of fact upon which Appellees could rely. A. 132a. It ordered new non-evasive answers and document production, but it did not order GAC to disregard the Security Regulations. A. 69-70a.

Nevertheless, GAC's third responses merely stated that various cartel documents "purport to" reflect certain events. A. 143a. At trial GAC argued that even those responses, which it had elsewhere characterized as authentic and accurate, R. 18553, were so unreliable, incompetent and rife with hearsay as to be inadmissible. A. 139a.

GAC also concealed cartel documents located in the United States. Despite court orders, GAC delayed submission of certain cartel documents (the "Snyder documents") until discovery ended, "effectively preclud[ing]" their use in depositions. A. 162a. Moreover, in January 1978 (during trial in Santa Fe) GAC produced to the federal grand jury cartel documents that it had not produced in this case, although its counsel had represented on October 7, 1977 that "every document that is available in the United States that is responsive to [the Second Set of Interrogatories] has been produced." A. 163a. GAC produced these documents to Appellees after UNC learned of them from litigants in other cases. *Id.*

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[8] GAC's previous failure to predicate its objections on the Security Regulations remains, as the New Mexico Supreme Court noted, "inexplicable." A. 140a; *see also* A. 142a. The New Mexico court concluded that GAC's failure to timely raise the foreign disclosure objection was "itself evidence of a lack of good faith," A. 141a, and constituted a waiver of such an objection. *Id.*

THIS COURT DOES NOT HAVE APPEAL JURISDICTION OF THIS CASE

1. The Validity of a State Statute Has Not Been Drawn Into Question.

For jurisdiction on appeal from a state court, there must be "drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity." 28 U.S.C. § 1257(2). *See, e.g., Kulko* v. *California Superior Court,* 436 U.S. 84, 90 n.4 (1978); *Hanson* v. *Denckla,* 357 U.S. 235, 244 (1958); *Charleston Assn* v. *Alderson,* 324 U.S. 182, 185 (1945). It is not enough that GAC could have attacked the validity of the statute as applied, if it did not. *Memphis Gas Co.* v. *Beeler,* 315 U.S. 649, 650-51 (1942).

GAC cannot show that it "drew in question the validity as applied of a state statute (the New Mexico Antitrust Act) and a state discovery rule (Rule 37 of the New Mexico Rules of Civil Procedure)." J.S. 2. GAC's record references in "Raising the Federal Questions," J.S. 3, reflect no challenge to the validity of the state's statutes; nor did the courts below pass on such questions.[9] GAC's discussion of "Raising the Federal Questions", J.S. 3-4, and its "Questions Presented", J.S. (i), do not implicate the validity of any state statutes, nor do GAC's citations to the opinion below. A. 46-73a, 165-179a.

2. This Court Has Already Denied Certiorari With Respect to the New Mexico Supreme Court's May 7, 1979 Judgment; GAC's Request for Review Now Is Untimely, Whether on Appeal or Certiorari.

GAC again seeks review of the May 7, 1979 judgment of the New Mexico Supreme Court, *United Nuclear Corp.* v. *General Atomic Co.,* 93 N.M. 105, 597 P.2d 290, *cert. denied,*

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[9] GAC challenged below the New Mexico Antitrust Act as applied on grounds of federal preemption, but does not pursue that claim here.

444 U.S. 911 (1979), which affirmed a partial final judgment on arbitration issues. GAC previously sought certiorari on that judgment (Case No. 79-190), and this Court denied its petition.[10] GAC then urged that the New Mexico court's partial final judgment, which GAC now describes as "interlocutory," A. (i)a, was a final judgment under 28 U.S.C. § 1257(3). GAC's previous view seems correct. *Packinghouse Workers* v. *Needham,* 376 U.S. 247, 249 n.2 (1964); *see Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 482-85 (1975). Since the May 7, 1979 decision was final, review now would appear time-barred under 28 U.S.C. § 2101(c) and Rules 11, 12 and 20 of this Court. *Dickinson* v. *Petroleum Conversion Corp.,* 338 U.S. 507 (1950).

THE JURISDICTIONAL STATEMENT RAISES NO SUBSTANTIAL FEDERAL QUESTIONS

I.

Assuming *Arguendo* That Review of the May 7, 1979 Judgment of the New Mexico Supreme Court Dealing With Waiver of Arbitration Is Timely, It Raises No Question of Federal Law Bearing on the Rights of I&M.

This aspect of the appeal relates solely to a dispute between GAC and UNC over GAC's alleged right to arbitrate its controversies with UNC. I&M has no agreement to arbitrate with either UNC or GAC. Indeed, GAC impleaded I&M into the New Mexico suit to litigate the whole I&M Contract controversy in one forum where both UNC and I&M would be bound. Nevertheless, GAC asserted on appeal that the trial court's decision to proceed with the trial vitiates subsequent proceedings, including I&M's judgment,

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[10] In apparent disregard of this Court's Rule 15.1(j)(ii), GAC neither acknowledges this problem nor, except in a single citation, J.S. 14, even suggests that certiorari was sought and denied.

even though GAC had not sought a stay of the issues involving the I&M Contract.

Surely no substantial federal rights are implicated when, in its discretion, a state court proceeds with the ongoing trial of a nonarbitrable claim rather than await arbitration of a different claim involving a different party. *See Nederlandse Erts-Tankersmaatschappij, N.V.* v. *Isbrandtsen Co.*, 339 F.2d 440 (2d Cir. 1964); *see also Landis* v. *North American Co.*, 299 U.S. 248, 254-55 (1936). Since GAC never moved to stay I&M's suit, its claim here is even more trivial. It would serve no purpose to grant review to relieve GAC of a decision to go to trial with I&M it freely made and now regrets.[11]

II.

The New Mexico Supreme Court's Determination That GAC Was Afforded Due Process of Law Was in Accord With Applicable Decisions of This Court.

GAC's due process claims merely quarrel with particularized factual determinations, raise no questions of recurring concern, and lack merit. *See Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 73-74 (1955). The default judgment here is based on "a course of misconduct in discovery which began at the very outset of the case and ended only with the entry of . . . judgment." A. 176a. Default or dismissal is appropriate, and no due process principle is violated, where a party wilfully fails to comply with discovery orders. *National Hockey League* v. *Met. Hockey Club*, 427 U.S. 639 (1976); *Societe Internationale* v. *Rogers*, 357 U.S. 197 (1958); *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322

[11] Our Brief in Opposition to GAC's Certiorari Petition in Case No. 79-190 (which is being filed as Appendix D to UNC's Motion to Dismiss or Affirm) contains a full exposition and demonstrates fully the absence of any federal question, much less one deserving review.

(1909). *See also Link* v. *Wabash Railroad Co.*, 370 U.S. 626 (1962).[12]

A. Due Process Was Not Denied By the Trial Court's Refusal to Permit GAC Selectively to Disregard Discovery Obligations; Due Process Would Have Been Denied Appellees By a Contrary Result.

GAC asserts two related due process claims: (1) that the New Mexico courts should have postponed until the trial the determination that I&M and UNC were prejudiced by GAC's failure to provide information about Gulf's uranium marketing activities, including its efforts to fix prices, J.S. 27; and (2) the default on all issues of liability constituted "mere punishment", J.S. 28. Neither is substantial.

GAC baselessly asserts that "no effort whatever was made to determine whether United and I&M had been disadvantaged in any way and, if so, to what extent and on what issues." J.S. 27. It is undisputed that substantial evidence still lodged in Canada on September 23, 1976 because of GAC's persistent failures to make discovery for months before the Security Regulations were adopted, cannot be produced. The New Mexico Supreme Court expressly found that this evidence was necessary for a fair trial between GAC and I&M:

> I&M's counterclaim specifically alleged that by their participation in the cartel, GAC and Gulf had

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[12] The New Mexico Supreme Court was undoubtedly correct that:

> The rules of discovery are equally applicable to cases involving large sums as they are to small; and the obligation to comply with those rules in good faith and to obey the orders of the court is no less incumbent on the largest company than it is on the poorest citizen. Any contrary rule, or any special considerations in a billion dollar case, would be inimical to the most fundamental postulate of our legal system—that before the law, all stand equal. A. 179a.

Efforts to escape this salutary principle in various aspects of this case should not obscure the relevance of this principle.

> violated the New Mexico Antitrust Act, thereby injuring I&M. I&M also defended against GAC's claim that performance of its obligation to supply I&M with uranium had been rendered commercially impracticable by contending that the cartel was responsible for increases in the price of uranium, and therefore, such prices were not unforeseen by GAC and Gulf.
>
> The evidence which has been produced in this case demonstrates that information on the cartel could be crucial to the proper resolution of this litigation. A. 33a.

The courts below also determined that GAC prejudiced its opponents by its evasiveness in answering interrogatories and its refusal in its answers to commit itself to facts concerning the cartel and Gulf's participation in it. A. 138-39a.

Nothing in *Societe* supports GAC's claim that the trial court had to hold a trial before it determined there was prejudice. When I&M actually proposed such an alternative in November 1977, GAC's response was: "No court has ever held anything so ridiculous." Tr. 11/95, Nov. 16, 1977. Unlike this case, *Societe* involved a party which was innocently unable to comply with discovery orders because of a pre-existing foreign secrecy law, despite its good faith efforts. In light of the findings of good faith, there was no occasion to consider sanctions or determine prejudice.[13]

The New Mexico courts determined that GAC's concealment was so wide-ranging and irremediable as to prejudice a trial on any issues affected by GAC's efforts to control the uranium market. Due process does not dictate an opportunity for GAC to introduce favorable proof on the very

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[13] The language from *Societe* quoted by GAC at J.S. 28 simply pointed out that notwithstanding its good faith, where petitioner carried the ultimate burden of proof, the trial court could draw unfavorable inferences from the absence of needed evidence. 357 U.S. at 212-13.

issues, including prejudice, on which it wilfully concealed evidence. *Hammond Packing Co.* v. *Arkansas, supra,* and *National Hockey League* v. *Met. Hockey Club, supra,* approved default or dismissal without trial of the issue of prejudice.[14] Indeed, in *National Hockey League,* it seems unlikely that the prevailing party was permanently prejudiced by the discovery default, yet dismissal was approved. Here, the deprivation of important evidence was permanent.

GAC further complains of "a default . . . as to potentially dispositive issues on which the missing documents had no conceivable relevance." J.S. 28. This is a circular argument which illustrates the nub of the discovery problem, and it is fallacious. For one thing, the default judgment rested on multiple discovery violations, not just the missing documents. For another thing, only GAC knows what evidence has been withheld. The courts cannot determine what issues that evidence bears on,[15] and therefore had no way to determine the degree to which I&M (and UNC) were denied a fair trial. GAC points to no specific part of its dispute with I&M which was improperly foreclosed. In fact, a number of factual disputes between I&M and GAC unrelated to price fixing and market control have been tried, others have been remanded.[16]

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[14] *Societe* sets forth the exclusive two-step procedure to be used to impose sanctions for non-disclosure—*first,* a Rule 37(a) order directing production, followed by, *second,* a Rule 37(b) proceeding, which requires no trial, to determine the sanction. 357 U.S. at 207-08.

[15] GAC's representation that the evidence in Canada concerns Canada's regulation of its uranium industry is misleading. The Security Regulations cover a broad range of marketing activities, and GAC's objections were even more broadly framed.

[16] The trial court concluded that the default did not determine several issues, which it tried. The New Mexico Supreme Court's careful scrutiny of the breadth of the relief afforded to I&M is illustrated by its determination that the trial court improperly precluded GAC from offering evidence on two damage issues, which it remanded. A. 202-04a.

When GAC quarrels with the New Mexico Supreme Court's observation that "[a] party cannot approach its obligation to make good faith discovery however it chooses as to certain matters, and at the same time expect to have the case proceed in a normal fashion as to other issues," A. 176a, it forgets that sanctions preserve not only I&M's constitutional right to a fair hearing, but also the integrity of the New Mexico judicial system. A. 177-78a. *National Hockey League* v. *Met. Hockey Club,* 427 U.S. at 643.

B. GAC Received an Evidentiary Hearing and the Opportunity to Present Evidence on Those Disputed Factual Issues of Bad Faith That Were Not Matters of Record Within the Direct Knowledge of the Court.

GAC's claim that it was denied an evidentiary hearing on bad faith is incorrect.[17] In fact, such a hearing was held on November 14 and 16, 1977.

On November 4, 1977 UNC and I&M moved for sanctions based on GAC's failure to answer interrogatories and produce documents. UNC's brief expressly notified GAC of the housing charge:

> Gulf and GAC have pursued a conscious, and successful, policy of frustrating UNC's legitimate discovery rights by deliberately keeping all documents concerning cartel activities in Canada. R. 24290.

The trial court invited testimony and affidavits. Tr. 5/48-51, 55, Nov. 7, 1977; A. 156a.

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[17] As review of the findings of the courts below on questions of fact is not the function of this Court on appeal, we resist the temptation to dispute at length GAC's assertion, J.S. 29, that "the purported finding of bad faith is not supportable". *See Fry Roofing Co.* v. *Wood,* 344 U.S. 157, 160 (1952); *United States* v. *Johnston,* 268 U.S. 220, 227 (1925). *See also Southern Railway Co.* v. *Puckett,* 244 U.S. 571, 574 (1917); *Great Northern Ry. Co.* v. *Knapp,* 240 U.S. 464 (1916). The opinion below is replete with examples of Appellant's callous disregard of its discovery obligations. *See, e.g.,* A. 159, 162, 168-70a.

At the hearing on November 14 and 16, 1977, UNC and I&M pressed their contention that GAC and Gulf had deliberately housed cartel documents in Canada to avoid discovery. Deposition testimony of L. T. Gregg, formerly of GAC and Gulf Minerals Canada Limited, describing this precise policy, was received in evidence. GAC stated that it had no objection to this testimony and declined to offer any proof on the housing issue. A. 156a. On this basis, the trial court entered its preliminary sanctions decision of November 18, 1977. A. 155a.

GAC had several occasions to offer contrary evidence. Not until January 18, 1978 did GAC seek to "proffer" evidence on the housing issue and ask for another hearing. The "proffer" neither identified witnesses nor stated the substance of the proposed testimony, as was required by New Mexico Civil Procedure Rule 43(c). When GAC failed to respond to its express order to make a specific tender, the trial court rejected the proffer. The New Mexico Supreme Court held that a party which deliberately bypasses the opportunity to present evidence at a hearing cannot later plead a denial of procedural due process. A. 156-57a. *See D. H. Overmyer Co.* v. *Frick Co.*, 405 U.S. 174, 185 (1972); *Boddie* v. *Connecticut*, 401 U.S. 371, 378-79 (1971).

The other grounds of the default were matters of record directly known to the trial court.[18] The court's decision was based upon extensive briefing and made after repeated warnings that GAC's recalcitrance would bring severe sanc-

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[18] This Court need not reach this aspect of GAC's argument because the New Mexico Supreme Court held that the finding that Gulf followed a deliberate policy of housing documents in Canada, which GAC was given the opportunity to contest at an evidentiary hearing, "alone may be the basis for the imposition of such a discovery sanction as a default judgment." A. 159a. This Court does not decide constitutional questions unless necessary to the resolution of the case. *New York Transit Authority* v. *Beazer*, 440 U.S. 568, 582 (1979); *United States* v. *Campos-Serrano*, 404 U.S. 293, 295 (1971). *See Ashwander* v. *Valley Authority*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring).

tions and repeated opportunities for GAC to remedy the defects in its discovery. Due process does not require repeated evidentiary hearings to determine whether the discovery failures of record reflected conscious concealment or merely gross indifference to discovery obligations. Either is sufficient under New Mexico law, A. 170-71a, which follows federal practice in this regard. The trial court also declined GAC's request for a new hearing, based on seven affidavits of attorneys protesting their good faith, and the court below affirmed, noting that the affidavits confirmed GAC's bad faith and contradicted its prior representations in several respects, and concluding that no amount of testimony about attorneys' subjective intent could explain away GAC's patent discovery misconduct. A. 168-70a. Similarly, in *National Hockey League,* this Court gave no weight to an exculpatory affidavit of attorneys for the defaulting party where the lawyer swore that the discovery failures were inadvertent. *See In re Professional Hockey Antitrust Litigation,* 531 F.2d 1188, 1194 (3d Cir.), *rev'd sub nom. National Hockey League* v. *Met. Hockey Club,* 427 U.S. 639 (1976).

The New Mexico Supreme Court's own detailed analysis of the multiple instances of GAC's discovery misconduct, and its conclusion that the totality required a default judgment, wholly comports with this Court's decisions, and certainly calls for no intervention in an area where this Court has emphasized the lower courts' broad discretion to control "stonewalling" in discovery. *National Hockey League,* 427 U.S. at 642-43.

C. GAC's Effort to Place Itself Within the Rule of *Societe Internationale* Is Misplaced.

Finally, GAC claims that under *Societe,* default was improperly based on its failure to produce or identify the cartel documents housed in Canada, because it could not produce the documents after September 23, 1976 when the Security Regulations became effective.

This issue is not properly before this Court, by reason of GAC's "inexplicable," A. 140a, failure timely to assert the Security Regulations as an objection under Rule 33 of the New Mexico Rules of Civil Procedure to requests for discovery from Canada. The court below emphasized that failure to object waives any justification for nondisclosure, A. 110, 125, 140-41a, and that consideration of GAC's arguments "in no way detracts from the significance . . . of GAC's failure to comply with the express provisions of Rule 33." A. 20a n.8. This Court will not review state court judgments which rest upon independent and adequate state law grounds. *Black* v. *Cutter Laboratories*, 351 U.S. 292, 298-99 (1956); Sup. Ct. R. 16.1(b).

Moreover, GAC misdescribes the decision below.[19] The New Mexico Supreme Court fully recognized (a) that the Security Regulations, *after* they were adopted, barred production, A. 146a, (b) that Canadian companies could not be forced to violate the law, and (c) that *Societe* held that inability to make discovery solely because of compliance with foreign law was not wilful non-compliance warranting Rule 37 sanctions. The trial court's discovery orders of October 11, November 18, and December 27, 1977, R. 16352-57, 17979-82, 18623-24, clearly instructed GAC that it should

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[19] GAC's assertion that it attempted to secure waivers of the Security Regulations "[w]hen the issue of the cartel was introduced into this case," J.S. 29, is erroneous. GAC did not seek waivers until October 13, 1977, eighteen days before the trial. GAC could not have honestly answered the first set of interrogatories filed on December 31, 1975, without disclosing the cartel and data regarding it. A. 118a. Moreover, GAC had to know in 1976 that, despite its concealment efforts, Appellees had learned of the cartel and were focusing on it as an issue in this litigation. In October 1976, I&M amended its complaint to add a Sherman Act claim in its Southern District action. *See* p. 4 *supra*. By November 1, 1976 UNC was referring to GAC's cartel activities as a violation of the New Mexico Antitrust Law. A. 121a & n.104. GAC itself claims that the cartel was raised as an issue in March 1977. J.S. 7. The fact is that GAC wasted over a year before it made any efforts to obtain a waiver.

make discovery without violating Canadian law. The sanctions in this case, moveover, were not predicated upon non-compliance with the Security Regulations after September 23, 1976. The New Mexico Supreme Court's reasoning is simple and clear: (1) GAC's failure to produce the documents in Canada "was not based on inability; rather, it was due to its own bad faith conduct." A. 147a. GAC sedulously avoided discovery about the cartel for at least five months *before* the Security Regulations were adopted. (2) GAC's efforts to secure a waiver of the Security Regulations "were ... inadequate in at least three respects," namely, (i) despite the long pending discovery requests, GAC made no effort to obtain a waiver before October 13, 1977; (ii) its letter of October 13, 1977 "chose an avenue which it knew would be to no avail", and (iii) GAC failed to explore other avenues to obtain a waiver, including those its Canadian counsel recommended. A. 152-53a. (3) Gulf had "followed a deliberate policy of storing the cartel documents in Canada [rather than in the United States], and . . . this policy amounted to courting legal impediments to [the] production [of the records]." A. 159a. Each of these specific findings of bad faith is fatal to GAC's effort to cloak itself in *Societe*.[20]

III.

No Questions Regarding Act of State and Related Doctrines Are Properly Raised By This Case.

Disregarding the whole thrust of the opinion below, GAC asserts that the "default judgment entered against General Atomic rests squarely upon that company's inability to produce Canadian documents relating to the cartel because of the Canadian Uranium Information Secur-

[20] *Societe* states that whether a party "deliberately courted . . . impediments to production", as GAC did here, would have a "vital bearing on justification" for sanctions. 357 U.S. at 208-09.

ity Regulations." J.S. 13. For support, it misreads two fragments in the opinion below:

> United's efforts to secure discovery of records relating to this international uranium cartel became the major focus of this litigation, and GAC's failure to supply cartel-related information was the principal basis for the sanctions order and default judgment entered by the trial court. A. 12a.

and

> A year later the default judgment was entered because GAC failed to produce all of Gulf's cartel records. A. 21a.

The opinion makes clear that GAC was not defaulted because of non-production after September 23, 1976. Rather, the trial court defaulted GAC and the New Mexico Supreme Court affirmed for misconduct beginning at least five months *before* the Security Regulations were adopted, continuing through trial, and consisting of deliberately withholding cartel information by using whatever pretense the moment afforded. The fragments GAC relies on in fact make this point.

The first fragment, at A. 12a, refers not to documents in Canada but to "cartel-related information". That phrase encompasses the cartel documents and information which GAC failed to disclose in its responses to the December 31, 1975 interrogatories, several months before there were Security Regulations, as well as to other information which GAC withheld throughout this case. GAC's concealment of cartel-related information began long before September 23, 1976. The New Mexico Supreme Court was emphatic in this regard:

> By failing to provide cartel information prior to the passage of the Canadian Uranium Information Security Regulations, and then relying on these Regulations as an excuse for nonproduction, GAC is "in

> the position of having slain [its] parents and then pleading for mercy on the ground that [it] is an orphan." A. 125-26a.

The second fragment, at A. 21a, occurs in the middle of the court's discussion, A. 19-29a, of GAC's excuses for withholding documents of its constituent partners. The opinion specifically refers to GAC's unjustified withholding of Gulf's documents and information (which includes the vast bulk of the cartel data) *prior* to September 23, 1976:

> This issue arose when United served its First Set of Interrogatories on GAC [on December 31, 1975]. The interrogatories clearly called for information from "the partnership or partners" . . . . None of these interrogatories was objected to within the time provided by Rule 33. GAC provided only limited information from the partners in its original answers to those interrogatories [served in April 1976]. During several months of document production that followed the filing of those answers [beginning in June 1976], it did not produce any records from the partners' files. A. 19-20a (footnote omitted).

Even a cursory review of the New Mexico Supreme Court's discussion of GAC's discovery misconduct, A. 91-179a, confirms that the default rests on the totality of GAC's concealment. Moreover, the state courts fully accepted the legality and effectiveness of the Security Regulations and GAC's obligation to obey them, but held that GAC had created its own inability to produce, by deliberately housing documents in Canada.

Once this is recognized, nothing remains of GAC's foreign affairs arguments except the farfetched idea that the New Mexico courts lack jurisdiction even to investigate and decide their own jurisdiction once GAC has asserted that foreign governments were involved in the cartel while refusing to make discovery on those claims. Since GAC

"claim[s] no immunity" for acts within the United States and concedes that all the facts of the cartel may be proved as "background and motivation", J.S. 10 n.5, it is difficult to identify what activities GAC contends the state courts lacked "jurisdiction" to inquire into without running afoul of its conception of act of state principles. In any event, a naked assertion that a court lacks jurisdiction even to make the factual inquiry needed to determine its jurisdiction is baseless. *Durfee* v. *Duke,* 375 U.S. 106, 114 n.12 (1963).

While GAC mingles several doctrines regarding questions of foreign governmental involvement, J.S. 15-23, its attacks on the jurisdiction of the New Mexico courts seem to fall under the following headings:

1. The role and implementation of the act of state doctrine (*See* J.S. 17, 18, again at J.S. 19, and again at J.S. 20-22).

2. The policy against judicial interference with the foreign policy of the United States laid down in *United States* v. *Pink,* 315 U.S. 203 (1942); *United States* v. *Belmont,* 301 U.S. 324 (1937); and *Zschernig* v. *Miller,* 389 U.S. 429 (1968) (*See* J.S. 17, 19 and 22).

A. The Act of State Doctrine Is Not Involved in This Appeal.

The act of state doctrine is a limited one; its classical formulation appears in *Alfred Dunhill of London, Inc.* v. *Cuba,* 425 U.S. 682, 691 n.7 (1976) (quoting *Underhill* v. *Hernandez,* 168 U.S. 250, 252 (1897)):

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.

Acts of Canada within its jurisdiction are beyond challenge by United States courts. No party challenged such acts in this case, and the New Mexico courts did not do so.

It is well settled, however, that acts of private persons are subject to the laws of the United States, despite some involvement of a foreign sovereign in the subject matter. *Continental Co.* v. *Union Carbide*, 370 U.S. 690, 706 (1962); *United States* v. *Sisal Sales Corp.*, 274 U.S. 268 (1927). As the New Mexico Supreme Court noted, citing *Sisal* and *Carbide*:

> However, the initiation of the cartel and the participation therein by [the Canadian] Government are not sufficient alone to transform the cartel-related activities of a wholly-owned subsidiary of a corporation based in the United States into the sovereign acts of a foreign nation, and thus to immunize those activities from challenge in American courts. A. 48a.

To follow *Sisal* and *Carbide*, where both sovereign and private activity are involved, the court must ascertain what acts were those of the private party and what acts were those of a sovereign or compelled by the sovereign. Only then can it determine whether an act of state or sovereign compulsion defense applies, issues on which GAC had the burden of proof. *Dunhill, supra.*[21] The *Amicus* Brief filed in this case on behalf of Canada clearly recognizes this principle:

> Carefully circumscribed independent judicial inquiry may be appropriate when, as in this case, there are allegations of conduct going beyond the scope of the foreign government's involvement. Canadian Brief 7.[22]

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[21] *See also* remarks by John Shenefield, "Extraterritoriality and Antitrust—New Variations on a Familiar Theme," 5 Trade Reg. Rep. (CCH) ¶ 50,424 at 55,965 (Dec. 10, 1980): "The decisions clearly imply, and rightly so, that [when a claim of act of state has been made] the trial judges should proceed with building a record that can provide a reasoned basis for deciding whether to refuse jurisdiction [on the basis of the act of state doctrine]."

[22] Unfortunately, certain comments in the Canadian Brief, which deals primarily with other cases, are couched in terms so general that

(footnote continued on following page)

The New Mexico courts never stepped beyond this legitimate factual inquiry and never questioned the legality of the acts of any sovereign in connection with the cartel.[23] Moreover, because of GAC's discovery misconduct, the courts could not determine which acts of the cartel members were immunized by Canada and which were not.[24] Under such circumstances, the trial court had no basis to abdicate jurisdiction in deference to GAC's unsupported act of state claim and had to proceed to determine the contract claims before it.

Since it cannot establish that Canada compelled its anticompetitive activity, GAC claims that the New Mexico courts ignored "vital" statements regarding Canada's *export* laws which fix the prices and sales terms for uranium exported from Canada. This is a diversion. No one questions that the export regulations are sovereign acts. However, they totally fail to establish that Gulf's cartel conduct was commanded by the Canadian government. The export regulations dictate minimum export prices, not private anticompetitive activity of American companies, which is what was implicated in this action.

(footnote continued from preceding page)

they may prove less than helpful to this Court in its consideration of this case. For example, while there is a suggestion, Canadian Brief 8-9, that the New Mexico courts have misapprehended Canada's position, the brief fails to identify the specific points it regards as misunderstood. Canada's precise position on the genesis of the cartel and Canada's role in it is not relevant in view of the disposition of this case on the basis of GAC's pervasive bad faith in discovery.

[23] To suggest, as GAC does. J.S. 20, that factual inquiry might require foreign governments to answer interrogatories or foreign officials to testify is rank speculation. Certainly, the New Mexico courts made no such demands.

[24] There are good grounds to believe that Gulf had, in fact, attempted to shield its individual illegal conduct behind governmental immunity. Prime Minister Trudeau has himself confirmed the fact that some cartelists acting under "pretext or cover" of government policy, might have engaged in private anticompetitive activity. A. 52a.

GAC erroneously accuses the New Mexico Supreme Court of using the *"Bernstein"* exception to confer jurisdiction notwithstanding the act of state doctrine. J.S. 21, 22. That court did not rely on the *"Bernstein"* doctrine to obtain jurisdiction. It merely considered the views of the executive branch, which did not seek immunity for Gulf's cartel conduct and instead had brought a criminal proceeding against Gulf. A. 60-64a. Whatever the status of *"Bernstein"*, there can be no objection to *considering* the executive branch's position. *See First Nat. City Bank* v. *Banco Nacional de Cuba,* 406 U.S. 759, 790 (1972) (Brennan, J., dissenting).

B. The Prohibition Against Judicial Involvement in Foreign Relations Is Not Implicated in This Case.

GAC complains that the New Mexico Supreme Court "abolished the rule that states may not interfere with foreign policy." J.S. 17, 19. This is incorrect.

Cases like *Pink, Belmont* and *Zschernig* establish that courts may not interfere in or undertake "minute inquiries concerning the actual administration of foreign law . . . [and] the credibility of foreign diplomatic statements." *Zschernig* v. *Miller,* 389 U.S. at 435-36. The New Mexico courts engaged in no such conduct. Certainly, the trial court did not decide the legality or correctness of the actions or representations of a foreign sovereign, save to accept the representation of Canada that its Security Regulations were valid and binding on Gulf in Canada. A court runs afoul of *Zschernig, Pink* and *Belmont* only when it rejects foreign law and the authoritative construction of foreign law by foreign officials. The New Mexico courts made no such blunder.

C. GAC's Miscellaneous Non-Jurisdictional Concerns Provide No Basis for Review.

GAC suggests two "anomalies" requiring plenary review but unrelated to jurisdiction. These are illusory.

1. Citing *California Liquor Dealers* v. *Midcal Aluminum*, 445 U.S. 97 (1980), GAC says that the decision below reaches the "inconceivable" result, J.S. 18, that states have more power than foreign sovereigns to immunize anti-competitive conduct. In *Midcal*, after analyzing the facts alleged to constitute compulsion, as the New Mexico courts sought to do here, this Court espoused an approach which accords no greater immunizing force to compulsion by a state than the decision below accords compulsion by a foreign sovereign. In fact, the New Mexico courts indicated that they would have looked to *Midcal* for guidance had they reached the issue of sovereign compulsion. *See, e.g.*, A. 56-57a n.45.[25]

2. Contrary to GAC's assertion, neither "the dignity nor rights" of a foreign sovereign were in issue before the New Mexico courts. *Compare Ex Parte Peru*, 318 U.S. 578 (1943).[26]

GAC argues otherwise by citing briefs filed on behalf of Canada in other cases. We have already noted, with respect to the *Amicus* Brief filed on Canada's behalf in this Court, that Canada has been misled as to the procedural posture of this case and the basis for sanctions.[27] Obviously, the pend-

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[25] GAC, citing *Gordon* v. *New York Stock Exchange*, 422 U.S. 659 (1975), and *United States* v. *National Assn. Securities Dealers*, 422 U.S. 694 (1975), complains that the United States Congress has more power than foreign sovereigns to immunize private citizens from antitrust liability. J.S. 18. That is no anomaly. Of course, Congress has the power to effect partial repeal of a law it enacted.

[26] In *Ex Parte Peru, supra*, the rights of a sovereign state were clearly in issue. A ship owned by the Peruvian government had been seized under a libel. The District Court concluded that the Peruvian government had waived sovereign immunity. The Supreme Court granted an extraordinary writ to vindicate the sovereign immunity of Peru.

[27] The Canadian government has recognized that an American court may impose sanctions on a litigant for discovery misconduct, including its failure to produce documents because of its bad faith or fault. A. 454-55, 472, 478, 483a.

ing Sherman Act litigation brought by Westinghouse and Tennessee Valley Authority against numerous uranium suppliers, including foreign companies, may have broad foreign affairs implications that were never reached in this case because it was properly decided on the narrow question of sanctions for nondisclosure.

The representations of the Canadian government filed with the trial court expressed Canada's concern lest that court compel Gulf to violate the Security Regulations. As we have noted, the New Mexico courts respected that concern and required no such action.[28]

D. The Other Hypothetical Issues Presented By GAC Are Not Adequately Developed for Review.

GAC suggests, J.S. 16, 17, that review would clarify large legal issues surrounding the cartel, such as sovereign compulsion standards, legal conflicts with "detailed foreign regulation" of an industry, the requirements of comity, and the act of state doctrine. However, GAC cannot indicate where any such issues were decided below, as required by this Court's Rule 15.1(g). This is because the New Mexico Supreme Court repeatedly emphasized that it did not decide such issues nor find the underlying facts, and it did not need to do so, in light of GAC's default. A. 3, 12, 14, 39, 49-50, 55, 87a. At this stage such hypothetical issues are neither necessary nor suitable for review. *Socialist Labor Party* v. *Gilligan*, 406 U.S. 583 (1972). *See Rescue Army* v. *Municipal Court*, 331 U.S. 549 (1947). Moreover, the facts are inadequately developed for review. *Lathrop* v. *Donohue*, 367 U.S. 820, 846-48 (1961) (plurality opinion).

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[28] GAC's representations concerning the New Mexico Supreme Court's refusal to accept Canada's brief is misleading. It was not accepted because it was offered one year after the court had heard oral argument and no reason was given for the delay in its submission. Moreover, the court stated that it was aware of Canada's position and was considering it. A. 62-63a n.49.

CONCLUSION

For the reasons set forth, GAC's appeal should be dismissed, or, in the alternative, the judgment should be affirmed because, as to the judgment of May 7, 1979, the appeal raises questions outside the Court's jurisdiction and was not taken in conformity with statute, and as to all issues, the appeal presents no substantial federal question.

Treating the jurisdictional statement as a petition for certiorari, it presents no adequate ground for such review, and it should be denied.

Respectfully submitted,

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March 17, 1981

APPENDIX

APPENDIX A

Parent: American Electric Power Company, Inc.

Affiliates and Subsidiaries:

American Electric Power Service Corporation
Appalachian Power Company
Beech Bottom Power Company
Blackhawk Coal Company
Cardinal Operating Company
Cedar Coal Co.
Central Appalachian Coal Company
Central Coal Company
Central Ohio Coal Company
Central Operating Company
Colomet, Inc.
Columbus and Southern Ohio Electric Company
Franklin Real Estate Company
Indiana Franklin Realty, Inc.
Indiana-Kentucky Electric Corporation
*Indiana & Michigan Electric Company
Kanawha Valley Power Company
Kentucky Power Company
Kingsport Power Company
Michigan Electric Power Company
(Formerly Sewell Valley Utilities Co.)
Michigan Gas Exploration Company
Michigan Power Company
Ohio Power Company
Ohio Valley Electric Corporation
Price River Coal Company, Inc.
(Formerly Castlegate Coal Company)
Simco, Inc.
Southern Ohio Coal Company
(Formerly Captina Operating Company)
Twin Branch Railroad Company
West Virginia Power Company
Wheeling Electric Company
Windsor Power House Coal Company

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* Appellee.

APPENDIX B

STATUTES INVOLVED

Rule 33 of the New Mexico Rules of Civil Procedure (1978) (amended in 1979) provides:

Rule 33. Interrogatories to parties.—Any party may serve upon any adverse party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may be served after commencement of the action and without leave of court, except that, if service is made by the plaintiff within fifteen [15] days after such commencement, leave of court granted with or without notice must first be obtained. The interrogatories shall be answered separately and fully in writing under oath. The answers shall be signed by the person making them; and the party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories, within fifteen [15] days after the service of the interrogatories, unless the court, on motion and notice and for good cause shown, enlarges or shortens the time. Within ten [10] days after service of interrogatories a party may serve written objections thereto together with a notice of hearing the objections at the earliest practicable time. Answers to interrogatories to which objection is made shall be deferred until the objections are determined.

Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the same extent as provided in Rule 26(d) for the use of the deposition of a party. Interrogatories may be served after a deposition has been taken, and a deposition may be sought after interrogatories have been answered, but the court, on motion of the deponent or the party interrogated, may make such protective order as justice may

require. The number of interrogatories or of sets of interrogatories to be served is not limited except as justice requires to protect the party from annoyance, expense, embarrassment, or oppression. The provisions of Rule 30 (b) are applicable for the protection of the party from whom answers to interrogatories are sought under this rule.

Rule 37(a) of the New Mexico Rules of Civil Procedure (1978) (amended in 1979) provides:

Rule 37. Refusal to make discovery—Consequences.

(a) Refusal to answer. If a party or other deponent refuses to answer any question propounded upon oral examination, the examinatioin shall be completed on other matters or adjourned, as the proponent of the question may prefer. Thereafter, on reasonable notice to all persons affected thereby, he may apply to the court in the county where the deposition is taken for an order compelling an answer. Upon the refusal of a deponent to answer any interrogatory submitted under Rule 31 or upon the refusal of a party to answer any interrogatory submitted under Rule 38, the proponent of the question may on like notice make like application for such an order. If the motion is granted and if the court finds that the refusal was without substantial justification the court shall require the refusing party or deponent and the party or attorney advising the refusal or either of them to pay to the examining party the amount of the reasonable expenses incurred in obtaining the order, including reasonable attorney's fees. If the motion is denied and if the court finds that the motion was made without substantial justification, the court shall require the examining party or the attorney advising the motion or both of them to pay to the refusing party or witness the amount of the reasonable expenses incurred in opposing the motion, including reasonable attorney's fees.

Appendix B

Rule 43(c) of the New Mexico Rules of Civil Procedure (1978) (amended in 1979) provides:

Rule 43. Evidence.

* * *

(c) Record of excluded evidence. In an action tried by a jury, if an objection to a question propounded to a witness is sustained by the court, the examining attorney may make a specific offer of what he expects to prove by the answer of the witness. The court may require the offer to be made out of the hearing of the jury. The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. In actions tried without a jury the same procedure may be followed, except that the court upon request shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged.